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As this issue closes our eleventh volume and marks the retirement of the present Board, we wish to thank those who have co-operated with us during the year, and especially do we wish to assure Professors Baldwin and Wurts of our appreciation of their kindly interest and helpful suggestions. We are also much indebted to the '98 Chairman, Mr. Charles F. Clemons, who has been very active in furthering the interests of the JOURNAL.

COMMENT.

MALICIOUS PROCURING REFUSAL TO CONTRACT.

The doctrine enunciated in *Allen v. Flood,* (1898) A. C. 1—that an act otherwise lawful does not become actionable, because it proceeds from a bad motive—is by no means new to English law. *Stevenson v. Newnham,* 13 C. B. 285, 297; *Jenkins v. Fowler,* 24 Penn. St. 308 (1855). The importance of the decision lies in affirming its application to cases of malicious procuring of refusal to contract and answering in the affirmative this question, "Is it lawful for one person to interfere with employment of another where the acts of interference induce no breach of contract and are not accompanied by either fraud or violence." Upon this point the law in England was unsettled. Lord Esher in *Temperton v. Russell,* (1893) 1 Q. B. 715; *Carrington v. Taylor,* 11 East 571. Nor were the American courts in harmony: *Walker v. Cronin,* 107 Mass. 555; *Roycroft v.* Taylor, 64 Vt. 209.

In England, *Allen v. Flood* must now be read in the light of *Quinn v. Leathem,* (1901) A. C. 495, where it was exhaustively reviewed and explained, in part by the same judges. While in the latter case questions of conspiracy, procuring breach of contract, etc., entered, yet an intention is manifest to confine the *Allen v. Flood* doctrine strictly to the facts there decided. In fact, this latter decision negatives what would be otherwise a rational conclusion to draw from *Allen v. Flood* and the doctrine of *Huttley v. Simmons,* (1898) 1 Q. B. 181,—what one may lawfully do, several may combine to do—namely, that a combination with bad motive would be

legal. It would appear that the contrary, qualified in cases of competition by *Mogul Steamship Co. v. McGregor,* (1892) A. C. 25, is the true position of the House of Lords. The Canadian Supreme Court is in accord with *Allen v. Flood. Perrault v. Gauthier,* 28 Can. Sup. Ct. 241.

Thus far the American courts have shown little inclination to follow the doctrine enunciated. The Massachusetts court in *Plant v. Woods,* 176 Mass. 492 and *Moran v. Dunphy,* 177 Mass. 485 refused to follow the English case. In *State v. Huegin,* 110 Wisc. 189, the Wisconsin court also disapproved of the doctrine and declared it not to be the law of that State. So in *Transportation Co. v. Standard Oil Co.,* 43 S. E. 591 (W. Vir.), the principle was denied. While, in *Passaic Print Works v. Dry Goods Co.,* 105 Fed. 163, the Circuit Court approved *Allen v. Flood,* the case involved only malicious use of one's private property.

The New York Court of Appeals, in a recent case, passed upon *Allen v. Flood* and also declined to follow it as regards malice, although the influence of the English case upon the court's decision in other particulars is quite apparent. An organization of steam fitters refused to allow its members to work with those of a rival organization, the plaintiff, and through its walking delegate, Cumming, threatened various employers that unless the members of the plaintiff organization were discharged and its own members engaged in their places, they would stop work and cause a general strike of all trades employed on the job, an act which was within their power. They further threatened to pursue this course wherever they found the plaintiff's members working with their own, and thus to drive it out of existence, but in no case were force or unlawful acts employed or threats made, except the threat to strike unless their demands were complied with. The legal similarity of the case to *Allen v. Flood* is at once apparent—in both cases the courts refused to notice conspiracy and it was upon the authority of that case alone that the Appellate Division held that plaintiff had no cause of action. The Court of Appeals now affirms their decision, but upon somewhat different grounds. *National Protect. Ass'n of Steam Fitters v. Cumming,* 63 N. E. 369. Vann, Bartlett and Martin, J. J., dissenting.

Although somewhat aside from the question we are here discussing, the position of the court in reference to the legality of strike in general, is too important to be overlooked. It takes the broad attitude which is manifest in *Allen v. Flood,* the attitude also of Chief Justice Holmes—that an indirect benefit, causing direct injury

to rivals, may as properly be the object of a strike as a benefit, obvious and direct,—a much more liberal position than the case of *Curran v. Galen,* 152 N. Y. 33 (1897), would lead one to expect.

The following is from Chief Justice Parker's opinion: "I know that it is said in another opinion in this case that 'workmen cannot dictate to employers how they shall carry on their business, nor whom they shall or shall not employ;' but I dissent absolutely from that proposition and assert so long as workmen must assume all the risk of injury that may come to them through the carelessness of co-employés, they have the moral and legal right to say that they will not work with certain men and the employer must accept their dictation or go without their services. * * * Having the right to insist that plaintiffs' men be discharged and defendants' men put in their places if the services of the other members of the organization were to be retained, they also had the right to threaten that none of their men would stay unless their members could have all the work there was to do. * * * A labor organization is endowed with precisely the same legal right as is an individual to threaten to do that which it may lawfully do." When the facts of the case are considered, it is evident by this decision, organized labor in the State of New York has obtained a strong vantage ground.

But the essential doctrine of *Allen v. Flood,* that motive is immaterial when the act itself is legal, the majority refuse to follow, although Chief Justice Parker, with whom concur two other judges, unqualifiedly takes that position. The Chief Justice's opinion, referring to certain propositions of the other judges, reads as follows: "I wish to again call attention to so much of them as intimates that if the motive be unlawful or be not for the good of the organization or some of its members, but prompted wholly by malice and a desire to injure others, then an act which would be otherwise legal becomes unlawful. To state it concretely, if an organization strikes to help its members, the strike is lawful. If its purpose be merely to injure non-members, it is unlawful. I do not assent to this proposition although there is authority for it. It seems to me illogical and little short of absurd to say that the every-day acts of the business world apparently within the domain of competition may be either lawful or unlawful according to the motive of the actor. * * * But for the purpose of this discussion, I shall assume this proposition to be sound." And upon this assumption that motive is material but in this case proper, the judgement proceeded, a fourth judge concurring upon that ground. The

remaining three judges held motive to be material and vigorously asserted that in this case it was improper and the means illegal.

While it would be impossible to lay down any universal rule, yet seemingly the trend of opinion is contrary to the doctrine of *Allen v. Flood* and is to the effect that motive in procuring refusal to contract may determine the liability. Yet one effect of *Allen v. Flood,* worthy to be noted, has been to clarify the subject of malice and force the arguments relating to its materiality in civil cases, pro and con, to much sounder and clearer basis.